No. 12,089

IN THE

United States Court of Appeals

For the Ninth Circuit

JAMES E. EVERETT,
Appellant,

vs.

SOUTHERN PACIFIC COMPANY
(a corporation),
Appellee.

APPELLANT'S OPENING BRIEF.

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STATEMENT OF JURISDICTION.

This is an appeal from a judgment of the United States District Court, for the Northern District of California, Southern Division, entered on the verdict of a jury in an action founded upon the Federal Employers' Liability Act (United States Code, Title 45, Section 51, et seq.), and the Federal Boiler Inspection Act (United States Code, Title 45, Section 23, et seq.). Jurisdiction of the District Court rested upon United States Code, Title 45, Section 56, and the jurisdiction of this Court upon appeal is conferred by United States Code, Title 28, Section 225(a).

STATEMENT OF THE CASE.

This action was brought under the provisions of the Federal Employers' Liability Act, United States Code, Title 45, Section 51, et seq. The plaintiff, James E. Everett, was employed by the defendant as a fireman, and at the time of the accident complained of, was working on a locomotive in the defendant's railroad yard at Santa Barbara, California.

On the 14th day of July, 1947, at about 10:35 A. M. the plaintiff in the course of his employment was putting indicator numbers on defendant's locomotive, and when descending from the locomotive the handrail pulled out from its bracket and plaintiff fell and was injured.

The complaint charged that the engine and its parts and appurtenances were in an improper, unsafe and defective condition, in violation of the Boiler Inspection Act, (United States Code, Title 45, Section 23, et seq.). (T. R. pages 3 and 4.)

The answer denied the unsafe condition of the locomotive and also that plaintiff was injured as a result of a violation of the said Act. (T. R. page 7.)

The jury returned a verdict for the defendant. Motion for a new trial was presented in due time and denied by the Court. (T. R. page 17.)

SPECIFICATION OF ERRORS.

1. The Court erred in permitting testimony in evidence, under a promise by defense counsel to connect it up to the effect that plaintiff used intoxicating liquor to excess and that on occasions he was intoxicated.

2. The Court erred in refusing to grant plaintiff's motion for a new trial on grounds that the evidence, as a matter of law, was insufficient to support the verdict.

THE EVIDENCE.

The evidence in this case is not voluminous. For the convenience of the Court, we will here quote that portion which we believe to be essential to the determination of the issues involved.

Evidence Bearing on Specification of Error No. 1.

On cross-examination of Mr. Everett, the following questions and procedure occurred:

> "Q. As a matter of fact, Mr. Everett, you have been doing a good deal of drinking in Santa Barbara, haven't you?
>
> Mr. Brobst. I object to that as immaterial.
>
> Mr. Freeman. It is not immaterial. If this man is really trying to get well and is really spending his time drinking, that is very material.
>
> Mr. Brobst. I assign those remarks as prejudicial.
>
> The Court. I don't think that has any place in this case.

Mr. Freeman. I don't want to make an offer of proof in the presence of the jury, *but we are perfectly prepared to connect this up.* In other words, as I said before, and I said in my opening statement I want to show that there are factors other than the injury that are entering into Mr. Everett's conduct and his condition and this is very material for the jury to find out.

Mr. Brobst. If they have another fall, they can show, I have no objection, but I don't think this is material.

The Court. If there can be a connection shown between his present condition and these activities, it could be material. *However, if it cannot be connected up, it is not only immaterial, it is prejudicial.* I will adopt counsel's statement as given to the Court in the utmost good faith, and I will overrule the objection.

Mr. Freeman. Q. Have you been drinking to excess during the time, say, from the time you first left the hospital on August 18 until you returned in December?

A. No.

Q. How about the month of November?

A. November? No.

Q. And in particular the 11th, 12th and 13th.

A. I don't remember those dates.

Q. Would you say that your testimony would be any different, that you hadn't been drinking to excess at that time?

A. Would you ask that again, please?

Mr. Freeman. Will you read the question, please, Mr. Reporter?

(Record read.)

The Witness. I haven't.

Mr. Freeman. Q. Have you ever been suspended from your employment for drinking?

Mr. Brobst. I object to that as immaterial. Something that happened in the past certainly wouldn't have anything to do with this.

The Court. Sustained.

* * * * * * *

Q. Did you have any falls of any kind in this particular period of time?

A. No."

(T. R. pages 66, 67, 68.)

The following procedure occurred as defendant was examining its witness, Mr. Winkler:

"Q. About how far away were you at that particular time?

A. * * * On this particular instance we were able to get that close due to the fact that Mr. Everett was very much intoxicated.

Q. What made you think that?

A. By his staggering, which the pictures will show, and his actions.

Mr. Brobst. I will object to that as being wholly immaterial, your Honor, unless it shows a fall or something that might aggravate the injury.

The Court. The same line of objection made yesterday; *unless there is some connecting up of this, it will certainly be prejudicial.*

Mr. Freeman. Your Honor, we are offering this, as I said before, on the same basis, that his movements, bending, lifting and walking are entirely without any evidence of pain. As I said before, an element entering into this particular case is that rather than doing as he said—I have the transcript here—he said he could not do any

lifting at all, that he was in continual pain all the time, that he couldn't bend down without pain, and this man has observed him doing all this, and he has pictures of it and there is no evidence of any pain.

The Court. That, of course, is relevant, but the question of intoxication is what this objection is to, and I understood you to say yesterday that you would connect it up medically that that has some bearing on the recovery.

Mr. Freeman. No, I said, and I have the transcript here, I said this was material in my mind because of the fact we are showing he is making no effort to go back to work, he is engaging in other activities.

The Court. What bearing has the intoxication?

Mr. Freeman. I don't want to argue the whole facts before the jury, your Honor, but I am willing if you wish—well, I will leave that.

The Court. Very well. The part about the intoxication will go out.

* * * * * * *

Q. Do you have those pictures with you?

A. I have.

Mr. Freeman. I would like to offer those and *leave out the question of intoxication.*"

(T. R. pages 93 and 94.)

Evidence Bearing on Specification of Error No. 2.

On direct examination, the plaintiff testified as follows:

"Q. This train that you were working down there on the morning of July 14, 1947, what type of train was that?

A. Local freight.

Q. At the time the accident happened was the engine coupled on to the freight cars?

A. Yes, sir.

Q. Have you any idea how many freight cars it was hauling?

A. I couldn't say for sure; between 18 to 25. That is what we usually had.

Q. Now, is there some place on the engine where you number your train or designate it?

A. Yes.

Q. Where is that, please?

A. The indicator box.

Q. And where is the indicator box located?

A. It is on top of the boiler, at the smoke-stack.

Q. Now, also there are places for the train crew to stand when going up to put these numbers in the indicator box?

A. Yes.

Q. What is that called?

A. The running board.

Q. And where does that extend?

A. From the front of the cab to the front of the engine.

Q. Now, is there anything on the engine, itself, that you hold on to as you go up and down?

A. Yes.

Q. What is it?

A. Hand rail.

Q. And what is that made of, please?

A. It is about an inch-and-a-half pipe.

Mr. Brobst. I have some pictures here. I think that is the same engine (exhibiting to Mr. Freeman). I would like to offer these pictures—First, I will have them identified.

Q. Mr. Everett, I will show you this picture, first, and ask you if that is not the actual engine that was involved, which shows the handrail and the running boards, and the steps leading up to the indicator box, and the indicator box?

A. Yes.

Mr. Brobst. We will offer this as Plaintiff's No. 1, your Honor.

The Court. It will be received. Hand it to the clerk.

(The photograph was marked Plaintiff's Exhibit No. 1 in evidence.)

Mr. Brobst. Q. And likewise I will show you another picture. That is the same engine except a little closer view, is that correct?

A. That is right.

Mr. Brobst. I will ask that that be admitted, your Honor, as plaintiff's next.

The Court. It may be received, and after it is marked hand both of them to the jury.

(The photograph was marked Plaintiff's Exhibit No. 2 in evidence.)

Mr. Brobst. I don't know but what, first, your Honor, we might designate these various things by marks so that the jury can understand them.

The Court. What various things do you want to mark?

Mr. Brobst. The indicator box and the running board and the hand rail.

The Court. Isn't that obvious to anyone?

Mr. Brobst. Well, if there is any question I presume the jurors can ask.

(Photographs Exhibits 1 and 2 were handed to the jury.)

The Court. I think you may proceed. You may proceed with your questions.

Mr. Brobst. Q. What time did you go to work that morning, Mr. Everett?

A. 10:10 a.m.

Q. And what time did the accident happen?

A. About 10:35 a.m.

Q. Now, how do you find out what the designation of your train is going to be?

A. Well, the conductor gives orders through the dispatcher. They are all typed out on paper, and he brings them to the engine.

Q. And how did you find out what numbers to put up in the indicator box?

A. The conductor handed me the orders up on my side of the engine, and I looked at them. We were running Extra 1823, and I went out to the front to put up X-1823.

Q. Whose duty is it to put these marks up on the engine?

A. The fireman's.

Q. And did you start out to put up the indicators?

A. Yes.

Q. Where do they keep the numbers?

A. In a box behind the indicator. There is a little box behind the indicator.

Q. It is right behind the indicator box?

A. Yes.

Q. All right. Did you get the numbers to put in the indicator box?

A. Yes.

Q. Then what did you do?

A. I turned around to come down the steps backward and I had hold of the handrail with my left hand, and I fell.

Q. And what happened?

A. The hand rail came out and I fell.

Mr. Brobst. Well, I was going to use one of the pictures——

The Court. Q. You mean the hand rail pulled away?

A. It came out of the bracket that holds it.

Mr. Brobst. Q. This is Plaintiff's Exhibit No. 1, and, Mr. Everett, would you just indicate here with a pen mark where it was that hand rail came loose?

A. (The witness marks on photograph.)

Mr. Brobst. That is an 'X' that you marked there. This may be a little leading, but that is the bracket which is approximately in the center left-hand side of the engine?

A. Yes.

Mr. Brobst. I will make that a little darker (marking on photograph). I will mark that on Plaintiff's Exhibit No. 1 as E-1 (marking on photograph). I would like to pass this to the jury again. It shows the point where the hand rail gave away. It is marked as E-1 on Plaintiff's Exhibit No. 1.

The Court. It is marked with a cross now?

Mr. Brobst. It is marked with an 'X,' yes, sir, and the 'X' is designated by 'E-1.'

Q. All right, Mr. Everett, what happened to you when this hand rail pulled out?

A. I fell on the ground.

Q. In what position did you land?

A. A sitting position.

Q. And approximately how high is it from that running board on the side of the engine down to the ground?

A. Eight feet.

Q. Now, were you able to continue work that day?

A. No.

Q. Where were you taken from the Santa Barbara Yard, where the accident happened?

A. St. Francis Hospital.

Q. And where is the St. Francis Hospital located?

A. Santa Barbara.

Q. And were you in any pain?

A. Yes.

Q. And where was that pain localized?

A. Lower back.

Q. And when you got to the St. Francis Hospital who treated you there?

A. Dr. Harry E. Brown.

Q. Is he a doctor that is down there connected with the Southern Pacific?

Mr. Freeman. You mean the Hospital Association?

Mr. Brobst. Q. The Southern Pacific Hospital Association, we will put it that way so we won't get to bickering about terms. All right, how long did you stay there in the St. Francis Hospital?

A. Four days.

Q. And what type of treatment did they give you, if any, while you were there?

A. They didn't give me any—X-rays.

Q. Just stayed in bed?

A. Yes.

Q. Did they give you anything for the pain you were having in your back?

A. Yes, give me pain pills.

Q. Then after four days in the hospital what was done for you?

A. I was sent to the Southern Pacific Hospital in San Francisco.

Q. Came up to the Southern Pacific Hospital here in San Francisco?

A. Yes.

Q. And how long did you remain here when they sent you up the first time?

A. From the 19th of July until the 11th of August.

Q. And what doctor treated you?

A. Dr. McRae, Dr. Steiner, and Dr. Haynes."

(T. R. pages 31 to 36.)

The hospital records in evidence as defendant's Exhibit F gave the following description of the accident:

"Mr. Brobst. This is on a yellow sheet. 7/18/47 is the date of this. 'Patient states that on duty last Monday 7/14/47 about 10:35 a.m. at Santa Barbara, California yards while he was in front of the engine No. 1823 the hand rail came loose and he lost his balance, and fell on the ground from about 8 feet landing on his feet and backwards. * * *"

(T. R. page 86.)

There is no other evidence on how the accident happened. Counsel for defendant admitted that the hand rail was broken and pulled out from its bracket.

"Mr. Brobst. I wonder if there could be one more admission: That the hand hold was found broken and in this pulled off position after the accident.

Mr. Freeman. That is correct. * * *"

(T. R. page 29.)

The hospital records, defendant's Exhibit F, show the following injuries:

"Here is the examination: 'Lumbar and sacral spine is very tender in the middle line to palpation. The muscles of these regions are spastic with movements. Extremities: Abduction, adduction, and flexion of the thighs upon the pelvis are limited due to the pain of lower back, the pain is more severe with the movements of left inferior member. The tough sensation and prick with a pin is diminished inside of left leg. Patient feels these sensations diminished compared with same regions on other side.'

"Here is report dated August 12, 1947, addressed to Dr. Washburn, evidently sent out under Dr. McRae's signature:

'James Elmer Everett, age 34 years, occupation locomotive fireman, Santa Barbara, California. Total service 6 years.

'In reply to Mr. Luhr's request for report: Mr. Everett was admitted to the hospital on July 18, 1947, with the following history:

'The patient states that on July 14, 1947, at about 10:35 a.m. at Santa Barbara, California Yards, while on duty in the front of Engine No. 1823, the hand rails came loose and he lost his balance and fell to the ground, a distance of about eight feet, landing on his feet, and bent backward. Immediately after the accident he felt a sharp pain in the lower back, the pain running down to back of both thighs and legs. He was taken by ambulance to Saint Francis Hospital at Santa Barbara, where X-rays were taken and he was then transferred to this hospital.

'At present he complains of pain in the lower back with radiation to the back of both thighs and legs. The pain does not increase on coughing.'

'Examination on entrance revealed a heavy-set man in apparently acute distress, with diffuse tenderness all over his back; spasm of the back muscles limitation of motion; tenderness over the coccyx with pain on motion. There was no evidence of neurological involvement and X-rays were negative for evidence of fracture.

'X-rays of the coccyx showed deviation to the right from a congenital deformity, without evidence of injury.

'He was treated by rest in bed and physiotherapy with complete relief of pain in his back. His coccyx continued to be painful and he was injected with novocaine, with relief.

'On August 11, 1947, his symptoms had entirely subsided and at his own request he was discharged with return to duty date for August 18, 1947.'

Now, here is one—this was on his return in 1948 in January to the hospital:

'Patient has had pain in region of coccyx since fall in July, 1947. Two admissions to hospital have been unsuccessful. Now in again because of continued pain in coccyx.

'1/20/48—caudal anesthesia with relief—only during period of anesthesia.

'1/27/48—tenderness about coccyx injected with 10 C.C. 2 per cent novocaine with relief temporary.

'February 2, 1948—patient up and about ward, etc. with visible evidence of any distress. However, still complains of tenderness over coccyx.' I don't know what that is. It looks like a three with a line over it.

Mr. Freeman. It had better be transcribed in its entirety.

Mr. Brobst. 'However, still complains of tenderness over coccyx. I believe that patient has some distress but not to the degree that he complains of; do not believe removal of the coccyx is indicated and do believe that he can return to work.'

Mr. Freeman. What was that date?

Mr. Brobst. 'Discharged February 6, 1948.' I think he went back to work after that.

Here is 12/7/47. I don't know what films those are. It says, 'Cane films,' I guess, 'of coccyx show displacement of last two segments. Question of excision is to be considered.'

'12/8/47—Again injected with novocaine surrounding coccyx.'

Mr. Freeman. We are going back to December, is that correct? The other one was February and this is December?

Mr. Brobst. Well, the order they are in—yes this precedes the other one.

'12/2/47, injured July 14, 1947, fell 8 feet off an engine landing on buttocks, was in this hospital one month, then seen by local M.D.'s in Santa Barbara and L. A. Diagnosis coccydynia, present complaint, pain on tip of cyccyx while sitting relieved by being up, dull aching both legs from hips down all the time, a tingling,' I guess,

'not aggravated by coughing. Examination showed tenderness on tip of coccyx on external palpation. Legs equal in diameter.'

This says, 'Now tender, no hypoesthesias.' I don't know what that 'tender' means.

Mr. Freeman. Do the best you can. It is pretty hard to read it. I don't know whether that is 'now' or 'non.'

Mr. Brobst. I don't either.

Mr. Freeman. Doctors write like lawyers.

Mr. Brobst. All right. Again, another injection of novocaine.

All right, here is an examination requested by Dr. McRae and I believe it is signed by Dr. Dunn. The date is 12/2/—this is December 1947. 'Pain at tip of coccyx, radiates to sacral region and down posterior aspect of legs.' And here is an X-ray reading in December of 1947—12/3/47, 'There is a marked deviation of the coccyx to the right, and the first segment appears to be slightly rotated to the right of the mesial line. I am unable to determine any definite signs of fracture.'

Here is one under date of 12/1/47. It shows, 'Coccyx painful on pressure.'

Here is a report signed by Dr. McRae the 11th day of December 1947. It says, 'Nature and Extent of Injury: Coccydynia, low back pain, pain down back of legs on coccyx on pressure. Another novocaine injection on that date.'

And here is a report signed by Mr. McRae dated February 17, 1948: 'In reply to Mr. Luhr's request for report: Mr. Everett returned to the hospital on several occasions, with the same complaints as previously noted, coccygeal pain.

'X-rays and clinical examination were negative except for tenderness at the tip of the coccyx.

'He was injected with novocaine on several occasions, with temporary relief.

'On February 2, 1948, a note was made in the record by Dr. Flinn, which reads as follows: 'Patient up and about ward, etc., without visible evidence of any distress. However, he still complains of tenderness over the coccyx.

'I believe that patient has some distress but not to the degree that he complains of. I do not believe removal of the coccyx is indicated, but do believe that he can return to work.' Signed by Dr. Flinn.

I think that is all."

(T. R. pages 86 to 91.)

SPECIFICATION OF ERROR NO. 1.

The sole question involved under this specification of error is this: If evidence of a nature tending to degrade and villify a party is admitted improperly under a promise of counsel to connect the same in such a manner as to render it admissible and subsequently there is a failure to so connect, what effect will admission of such evidence have upon a verdict rendered?

The repeated questions of counsel for defendant left no other impression upon the jury except that plaintiff was a drunkard or drank intoxicating liquor to excess, thus degrading the plaintiff and prejudicing

his rights before them. We have set out in the brief his testimony and evidence that was presented upon this subject. Counsel for the defendant stated to the Court that he was "perfectly prepared to connect up" the testimony concerning the use of intoxicating liquor by the plaintiff so that it would be properly admissible.

> "Mr. Freeman. I don't want to make an offer of proof in the presence of the jury, but we are perfectly prepared to connect this up."
>
> (T. R. page 66.)

In response to the above statement, the Court admonished counsel that it would certainly be prejudicial if this testimony was not connected up.

> "The Court. If there can be a connection shown between his present condition and these activities, it could be material. *However, if it cannot be connected up, it is not only immaterial, it is prejudicial.* I will adopt counsel's statement as given to the Court in the utmost good faith, and I will overrule the objection."
>
> (T. R. page 67.)

During the examination by defendant's counsel of the witness Sidney S. Winkler, who was called by the defendant and after the witness had testified that "Mr. Everett was very much intoxicated," the Court again admonished counsel that unless this intoxication was connected up, it would certainly be prejudicial.

> "The Court. The same line of objection made yesterday; unless there is some connecting up of this, *it will certainly be prejudicial.*"
>
> (T. R. page 93.)

The Courts have repeatedly held that where evidence of this type is brought before a jury, the Court cannot cure the error by admonishing the jury to disregard it or by striking such evidence from the record. The Appellate Courts have held that the mere admonition by the trial judge to disregard such evidence cannot erase it from the minds of the jurors; such evidence of necessity creates a prejudice against the party against whom the testimony has been admitted and prevents such party from having a fair trial. In the case of *Lusardi v. Prukop,* 116 Cal. App. 506, where hearsay evidence was admitted which tended to show that the defendant in the action was intoxicated, the Court held that such evidence was prejudicial and prevented the defendant from having a fair and impartial determination of his case.

> "The statement that Prukop had an alcoholic breath would immediately give rise to a conclusion that there was some lack of sobriety or that he was intoxicated. Such evidence has a tendency to raise a prejudice against the driver of an automobile * * *."
>
> "A different verdict could have been and might have been reached if this prejudicial evidence was absent. This is a case wherein we can apply the provision of section 4½ of article VI of the Constitution. The evidence was inadmissible as presented; it was prejudicial to the rights of the defendant and precluded him from having a fair and impartial determination of his case."

Granting that counsel for defendant stated to the Court in good faith that he was "perfectly prepared

to connect up" plaintiff's use of intoxicating liquor so that the evidence would be admissible his failure thereafter to connect up the testimony cannot be excused on that ground. The case of *Gee v. Fong Poy,* 88 Cal. App. 627, collects many cases dealing with various types of testimony admitted under the promise by counsel that it would be connected up, when such evidence, if not connected up, would be inadmissible and prejudicial. In that case it is stated that the question of good faith of counsel does not prevent a reversal, and the error is not cured by instruction of the Court to the jury to disregard such testimony.

> "It is in the discretion of the trial court to allow counsel some choice as to the order in which they will introduce their evidence, but when counsel have been permitted to introduce evidence out of its usual order on the assurance that it will be connected and its relevancy shown later, if the promised evidence is not brought forward, and if the irrelevant evidence is of a character likely to influence the jury, and if the verdict is on that side, a new trial should be granted. The fact that the promise may have been made in good faith does not alter the effect of the illegal evidence."

There was never any effort made by counsel for defendant to connect up the use of intoxicating liquors with plaintiff's injury or any other aspect of the case. The only effect that such testimony could have upon the jury was to prejudice it against the plaintiff and prevent him from having his case determined dispassionately and fairly by the jury. In the case of *Gee v. Fong Poy,* supra, the Court has this to say upon that subject:

> "Under our system no man can be said to have had justice accorded to him who has not had the opportunity to present his case and have that case heard dispassionately and fairly. To say that you can bring a person into court and, before the presentation of his case to a jury, be offering incompetent and irrelevant testimony, disgracing and degrading him to a degree that both he and his case may be deemed unworthy to be heard and be subjected to punishment, and that thereby you are not infringing upon his right to a fair and impartial hearing, is to declare what is obviously absurd."

The law as established in the *Gee V. Fong Poy* case was followed by the California Supreme Court in *Baroni v. Rosenburg,* 209 Cal. p. 4, where it affirmed the trial Court's granting of a new trial where counsel for defendant made erroneous statements which were stricken from the record by the trial Court. The Court holding that the irrelevant material had been before the jury and that the harm was done and that no admonition by the Court could erase this testimony from the mind of the jury.

The California State Appellate Court in the case of *Mangino v. Bonslett,* 109 Cal. App. 205, followed the rule as laid down in the case of *Gee v. Fong Poy,* supra, where the Court stated:

> "Appellant insists that the repeated admonition of the court to the jury to disregard the remarks of counsel cured whatever prejudicial effect the remarks had upon the jury. We cannot agree with this contention. We are satisfied that the

> remarks were of such a character, and the purpose of their injection into the case so apparent, that they could not have been completely obliterated from the minds of the jury by any admonition the court gave or could have given."

So in this case an admonition given by the Court could not have erased from the mind of the jury what this evidence was intended to convey, that is, that plaintiff was a drunkard and that possibly his injury was caused by his being intoxicated and that his failure to return to work was due to the fact that he was just lying around drinking. Counsel's question to the plaintiff concerning his suspension from employment for drinking could well have led the jury to believe that Mr. Everett was injured on the job as a result of intoxication and not because of a defect in the hand rail on the locomotive. Question is as follows:

> "Mr. Freeman. Have you ever (been) suspended from your employment for drinking?"
> (T. R. page 67.)

It is submitted that the immaterial testimony concerning the intoxication of plaintiff was highly prejudicial and prevented plaintiff from having a fair and impartial trial. This is brought out by the fact that the testimony was uncontradicted that the plaintiff was injured as the result of a violation of the Boiler Inspection Act which places an absolute liability upon the defendant.

SPECIFICATION OF ERROR NO. 2.

The evidence as a matter of law was insufficient to support the verdict. This action was based upon a violation by the defendant of the Boiler Inspection Act, United States Code, Title 45, Section 23, et seq.

> "§ 23. Use of unsafe locomotives and appurtenances unlawful; inspection tests
>
> It shall be unlawful for any carrier to use or permit to be used on its line any locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30, and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereafter provided for. Fed. 17, 1911, c. 103, § 2, 36 Stat. 913; Mar. 4, 1915, c. 169, § 1, 38 Stat. 1192; June 7, 1924, c. 355, § 2, 43 Stat. 659."

Under this section, it is the absolute duty of the carrier to have the locomotive and all parts and appurtenances thereof in a safe condition to operate. (*Baltimore & Ohio R. C. v. Groeger,* 45 S. Ct. 169.) It is not necessary under the provisions of this act to establish negligence or want of due care upon the part of the common carrier to hold it responsi-

ble for injury resulting from a defective condition of a locomotive or its appurtenances. This act makes the railroad's duty absolute and unqualified.

(*Luce v. N. Y. C. & St. L. R. Co.,* 211 N.Y.S. 184 and *Eker v. Pettibone,* 110 Fed. 451.)

The only testimony in the record as to how the accident happened was given by the plaintiff. He testified that as he was descending from the locomotive after placing numbers in the indicator box that the hand rail came loose from its bracket on the side of the engine, and he fell to the ground.

"Q. All right. Did you get the numbers to put in the indicator box?

A. Yes.

Q. Then what did you do?

A. I turned around to come down the steps backward and I had hold of the handrail with my left hand, and I fell.

Q. And what happened?

A. The hand rail came out and I fell.

Mr. Brobst. Well, I was going to use one of the pictures—

The Court. Q. You mean the handrail pulled away?

A. It came out of the bracket that holds it."

(T. R. page 34.)

This same description as to how the accident happened is contained in the hospital record which was admitted into evidence as defendant's Exhibit F. This description was contained in a letter sent by Dr. Washburn to Mr. Luhr, claim agent for the Southern Pacific Company.

"The patient states that on July 14, 1947, at about 10:35 A.M. at Santa Barbara, California yards, while on duty in the front of the engine #1023, the hand rails came loose and he lost his balance and fell to the ground, a distance of about 8 feet, landing on his feet and bent backward."

(T. R. page 87.)

In line with this testimony, the defendant admitted that after the accident the hand rail was found broken and in a pulled out position.

"Mr. Brobst. I wonder if there would be one more admission: That the hand hold was found broken and in this pulled off position after the accident.

Mr. Freeman. That is correct."

(T. R. page 29.)

There is absolutely no evidence in the record upon which the jury could have found that the accident resulted from any other cause than the defective condition of the hand rail on the engine. We are aware of the rule that if there is any substantial evidence at all upon which the verdict of the jury can be sustained that the reviewing Court will sustain the judgment entered upon a jury's verdict. However, this record is void not only as to substantial evidence but of any evidence whatsoever, to support the verdict of the jury. The only conclusion that can be reached is that the jury became prejudiced against the plaintiff by reason of the inferences and conclu-

sions raised by the admission in evidence of improper questions pointing to plaintiff's use of intoxicating liquor to excess, thus causing the jury to bring in a verdict against him based solely on prejudice.

CONCLUSION.

It is respectfully submitted that in the respects of the above assigned, the trial court committed prejudicial error and that the judgment should be set aside and reversed.

Dated, Oakland, California,
February 14, 1949.

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